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No. 84-1464

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN, DAVID L. WETSCH, MIKE CHRISTENSEN, JAMES D. BIRKENHOLZ AND BRUCE G. MOUNTAIN,

Petitioners,

vs.

SUPREME COURT OF IOWA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. Jurisdiction Does Lie Herein Under 28 U.S.C. §1257

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ARGUMENT

I. Jurisdiction Does Lie Herein Under
28 U.S.C. §1257

The first of the two questions presented
by the Respondent argues that this Court
is an improper forum because Respondent's

promulgation of the mandatory IOLTA is a rule-making exercise allegedly legislative in character, Respondent's Brief at 3-4. While rule-making that falls legitimately within Respondent's power would be a legislative function, Supreme Court of Virginia v. Consumers Union of the U.S., 446 U.S. 719, 731 (1980), the rule promulgating a mandatory IOLTA in Iowa consists of two components: (1) a regulation of the manner by which attorneys are required to handle their client trust accounts, and (2) a component that goes beyond the regulation of the practice of law and orders a regular, continuous and wholly arbitrary taking of clients' monies not belonging to Respondent which taking is either a tax or a condemnation; i.e., the exercise of a power outside the rule-making authority of Respondent. The venerable maxim of equity applies: "Equity looks to substance rather than form," Garner v. Pearson, 374 F.Supp. 580, 585

(M.D. Fla. 1973). Respondent's Order (see Petition, Appendix) does regulate the client trust accounts of attorneys, but it also orders unconstitutional takings of interest earned on clients' principal.

Respondents question petitioners' standing, Respondent's Brief at 4. While part of the thrust of petitioners' challenge concerns the unconstitutional injury that Respondent's Order will inflict upon third parties; i.e., on clients whose funds are held in attorney trust accounts, the attorneys are mandatorily required to assist that unconstitutional taking under pain of disciplinary action (see Petition at A-4, and Exh. A to Respondent's Order at A-8 to A-15), which consideration creates "..a significantly concrete dispute...against the Iowa Supreme Court...as enforcers of the Iowa Code of Professional Responsibility for Lawyers..," Rapp v. Comm. on Professional Ethics & Conduct, 504 F. Supp. 1092, 1101 (S.D.Iowa 1980),

citing Supreme Court of Virginia v. Consumers Union, supra, 100 S.Ct. at 1977, n.15 (446 U.S. at 736, n. 15). In Warth v. Seldin, 422 U.S. 490 (1975), this Court considered questions of standing and this Court explained that standing required the plaintiff to suffer, "..some threatened or actual injury resulting from the putatively illegal action ...," 422 U.S. at 499. The involvement of petitioners in the unconstitutional taking is now threatened and after July 1, 1985 will become actual, Respondent's Order at A-6 to A-7, Petition. Unlike the situation in Warth where none of the petitioners had an interest in any real property in the town whose zoning was under attack, Warth, supra, 422 U.S. at 504, petitioners here are mandatorily required to take part in the unconstitutional scheme, Respondent's Order at A-4, Petition. Therefore, that the injury to petitioners may be more indirect than to clients does not preclude stand-

ing, Warth, supra, 422 U.S. at 504-505, particularly as "..the asserted injury [threatens to be or will become actual on July 1, 1985 and thereafter] is the consequence of [Respondent's] actions, [and]... prospective relief will remove the harm," Warth, supra, 422 U.S. at 505.

II. There Is A Substantial Constitutional Question In This Case

Respondents state their premise for Iowa's IOLTA on p. 5 of their Brief. Contrary to Respondent's theme upon which Respondent's rest their justification for Iowa's mandatory IOLTA, it is both feasible and simple to allocate earnings on small amounts or on amounts held for short periods of time in pooled accounts to the individual clients. Petitioners' Brief filed with Respondent demonstrated that the calculations for allocation of costs and earnings can be easily performed on a hand-held pocket calculator,

Petitioners' Brief filed with Respondent, at 14-17.

In alleged support of its argument that no constitutional infirmity afflicts Iowa's IOLTA, Respondent points to the, "..two leading state supreme court decisions uphold[ing] income creating IOLTA programs from due process attacks...," Respondent's Brief at 6. The cited decisions are: In re Petition of the Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982) and In re Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981).

What Respondent fails to explain is that Minnesota's IOLTA and Florida's IOLTA are worlds apart. Like Iowa, Minnesota's IOLTA is mandatory (see Iowa State Bar Association ("ISBA") Brief filed with Respondent at 4); i.e., the client has no choice over whether the interest earned on his funds are to be returned to him or whether they are to be taken by the Minnesota Supreme Court through its agent, and the attorney has no choice

but to carry such accounts. On the other hand, Florida's IOLTA is voluntary, 402 So.2d at 393; i.e., the lawyer can either join in the IOLTA plan or stay out. Moreover, Florida adopted a voluntary program out of concern for this Court's decision in Webb's Fabulous Parmacies v. Beckwith, 449 U.S. 155 (1980). Thus, the Florida Supreme Court explained, In re Interest on Trust Accounts, supra, 402 So.2d at 393:

> In addition to these matters, a new consideration which affects the program in light of the Foundation's request that we make it mandatory is the Supreme Court's 1980 decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith. That consideration is whether the earnings on clients' funds are "property" of the clients which constitutionally cannot be taken from them without compensation. The dictates of the fifth and fourteenth amendments to the United States Constitution, as articulated in Webb's, obviously cannot be ignored in framing any program involving a state-directed use of income generated on private funds.

III

> Taking all factors into account, we adopt these concepts for a voluntary program designed to generate interest

on lawyer's trust accounts.
(emphasis added in this paragraph).

Petitioners' attack a mandatory IOLTA, but agree that a "..voluntary program might pass muster.." under the Constitution, Petitioners' Brief at 14-15.

Just as Respondent attempts to obscure the essential distinction between a mandatory and a voluntary program, (as above), so Respondent's agent, ISBA, which promoted a mandatory IOLTA before Respondent, published a map of the United States on the first page of the November, 1984 issue of ISBA's News Bulletin which showed all of the states of the United States that to that time had adopted IOLTA plans. However, no distinction was made in coloring between the mandatory plans (then adopted in four states: Arizona, California, Minnesota and Washington; see p. 4 of ISBA's Brief before Respondent) and the voluntary plans (then adopted by 29 states). A copy of said map is placed in the Appendix hereto. Since that time, some

five other states have adopted IOLTA's, of which only Iowa's is mandatory. Four states have considered and refused to adopt any IOLTA (see map, App. hereto). As admitted in ISBA's Brief before Respondent at 14:

> The majority of those states which have implimented a voluntary program have enrolled less than 20 percent of the attorneys eligible to participate. (emphasis supplied).

Since the states which have adopted voluntary IOLTA plans or have rejected any plan at all constitute over 85 percent of the states that have acted on the IOLTA question, and as less than 20 percent of the eligible attorneys have opted to join such voluntary programs, it is obvious that IOLTA's in general and mandatory IOLTA's in specific are as popular as the plague, Petitioners' Brief filed with Respondent at 26. It is that discomforting fact which Respondent is loath to admit.

Several pages of Respondent's Brief are devoted to convincing this Court that the

Beckwith case does not apply, Respondent's Brief at 6-8. The potent response is that the quotation from the Florida Supreme Court's decision quoted at 7-8, supra, clearly demonstrates that the Florida Court considered Beckwith to be highly germane to the nature of the taking in an IOLTA plan and in consequence said court shunned a mandatory program.

Lastly, the plea that this Court should await development "..of a body of case law in the lower courts..," Respondent's Brief at 9, should be rejected. In Iowa, the threatened unconstitutional activity is real and on July 1, 1985 it will become actual, and the unconstitutional activity is actual at present in four States. Furthermore, some States with voluntary plans or that have no plans and are reviewing the question might be tempted to convert to, or adopt mandatory plans. The harm is present, real and calls for the intervention

of this Court.

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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David L. Wetsch

Mike Christensen

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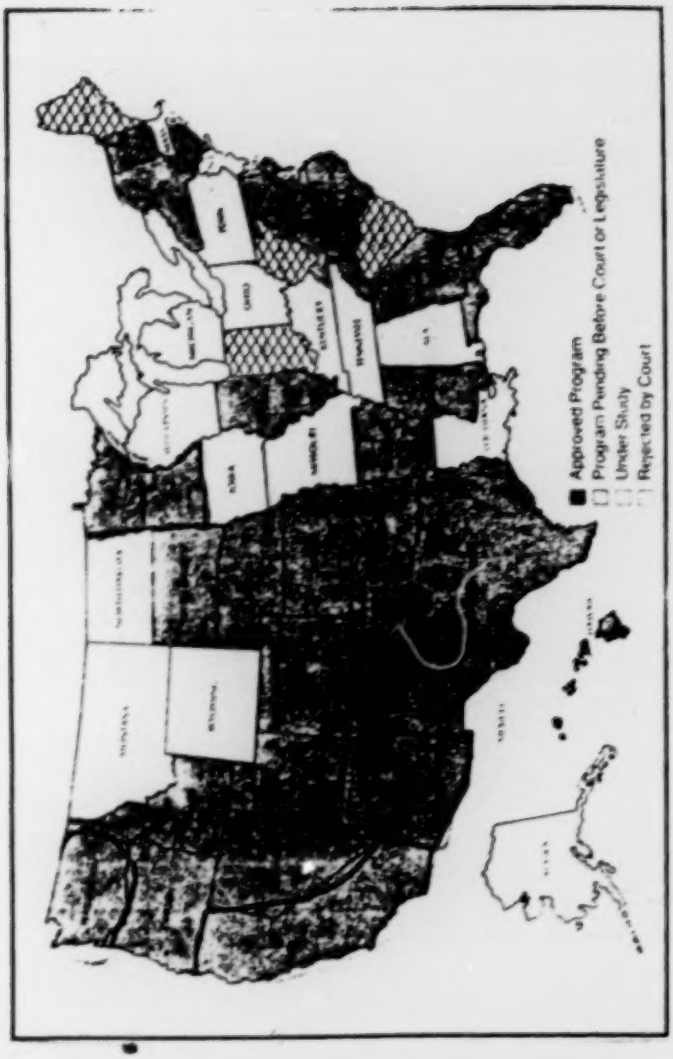
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